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IN THE

Supreme Court of the United States

October Term, 1980

No. 80-757

NEW YORK MERCANTILE EXCHANGE, RICHARD B. LEVINE, HOWARD GABLER and ALFRED PENNISI,
Petitioners,

v.

NEIL LEIST, PHILIP SMITH and INCOMCO,
Respondents.

No. 80-895

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.,
Petitioner,

v.

NEIL LEIST, PHILIP SMITH and INCOMCO,
Respondents.

No. 80-936

HEINOLD COMMODITIES, INC., THOMSON & MCKINNON AUCHINCLOSS KOHLMEYER, INC.,
Petitioners,

v.

NEIL LEIST, PHILIP SMITH and INCOMCO,
Respondents.

BRIEF OF RESPONDENTS NEIL LEIST, PHILIP SMITH AND INCOMCO

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Question Presented

In comprehensively rewriting the Commodity Exchange Act ("Act" or "CEA") in the "contemporary legal context" of 1973-74, for the purpose of enacting "remedial" legislation to strengthen deterrence against the very evils at bar, did Congress continue the theretofore well-recognized implied private action against brokerage houses and/or commodity exchanges?

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Statement of the Case

Petitioners, who are some of the defendants below, appeal from so much of the Second Circuit Court of Appeals decision in *Leist* v. *Simplot*, 638 F.2d 283 (2d Cir. 1980) (JA 83-173),* *rehearing and rehearing en banc denied*, Feinberg, C.J., Sept. 9, 1980 (JA 259-63) as upheld an implied private suit for damages resulting from

(i) commodity exchanges' violations of Sections 9(b), 5(d) and 5a(8) of the CEA, 7 U.S.C. §§13(b), 7(d) and 7a(8) (involving petitioners New York Mercantile Exchange, Inc. ("Exchange") and certain of its officials as defendants in the two actions now comprising No. 80-757), and

(ii) futures commissions merchants' violations of Sections 4a, 4b and 9(b) of the CEA, 7 U.S.C. §§6a, 6b and 13(b) (involving petitioners Heinold Commodities, Inc., Thomson & McKinnon Auchincloss Kohlmeyer, Inc. and Clayton Brokerage Co., Inc. in the actions comprising Nos. 80-936 and 80-895).

Other implied private actions under the CEA (including those against large manipulators, such as defendants J. R. Simplot and P. J. Taggares here, see *infra*) are NOT addressed or at issue on this appeal.

Respondents, plaintiffs below, are victims of—and cannot redress in "reparations", arbitration or anywhere EXCEPT this action—the very evils which have been the ***raison d'etre*** for federal commodity futures regulation since 1922, and which troubled Congress during enactment of the Commodity Futures Trading Commission Act ("CFTCA") in 1973-74:

(a) "large traders" who conspire to manipulate futures contract prices (JA 130-33); and

* Joint Appendix of relevant documents assembled by all counsel at bar. References are to page numbers.

(b) brokerage houses and exchanges which join in or feign ignorance of, that manipulation.[1]

See 7 U.S.C. §5; Hearings before the Senate Committee on Agriculture and Forestry (93rd Congress, Second Session) on S.2485, S.2578, S.2837 and H.R. 13113, pp. 201 (opening statement of Senator Clark), 474-477.

The manipulation here is uniquely EGREGIOUS because it involves the "notorious Maine potato futures default," the largest default in the annals of commodity futures trading. See *Wachovia Bank and Trust Company* v. *National Student Marketing Corp.*, —— F.2d ——, [Cur-

1. These evils and the commodity futures trading industry (especially the unparalleled incidence of swindling therein, which makes securities exchanges look like a Sunday School picnic, see *infra* this footnote) are the "first" and "most important factor" to be understood in an appellate court's statutory interpretation of the CEA. See Llewellyn, *Remarks On The Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 Vanderbilt L. Rev. 395, 397-99 (1950); Fitzgerald, *The Judicial Process In Statutory Construction*, U. Ill. L. F. 433 (1960) quoted in *Materials on Legislation*, at pp. 753-55, by Horace E. Read, John W. MacDonald Jefferson, B. Fordham and William J. Pierce, Foundation Press, 1973. In over 150 pages of submissions, petitioners and *amici* have conspicuously omitted "this first and most important factor" in "every" appellate decision hinging on interpretation of a statute, *i.e.*, an analysis of the egregious fact situation, the commodity futures industry generally and their "relationship to . . . the rest of society as it presently exists". Llewellyn, *supra*. These evils rendered unsuccessful the exchanges' pleas to be immunized from private suit (JA 138-141) and from the antitrust laws, Hearings on Review of Commodity Exchange Act and Discussion of Possible Changes Before the House Committee on Agriculture, 93rd Cong., 1st Sess., at 121; Hearings Before the Senate Committee on Agriculture and Forestry, 92nd Congress, 2d Sess., on S.2485, S.2578, S.2837 and H.R. 13113 ("Senate Hearings"), pp. 251-262, 317; JA 117.

Regarding the swindling, a trip to the trading pit of one of the exchanges to observe the floor traders (those persons responsible for handling the annual $1.5 trillion futures business, *New York Times*, Feb. 23, 1981, p. D-1, col. 8, reporting the granting of *certiorari* herein) is instructive. The whispering, the suspicious looks with which they regard outsiders, the bedlam defying close scrutiny and the almost palpable air of insider preference, collusion and cheating will vividly demonstrate what reading newspapers and current litera-

(footnote continued on next page)

rent] Fed. Sec. L. Rep. (CCH) ¶97,712 at p. 98,736 (D.C. Cir. 1980) (decided by Judge Abner Mikva who was a member of Congress in 1973-74 and who quotes extensively and favorably from the Second Circuit opinion below).

Briefly, this was a DEFAULT of unbelievable proportions after a conspiratorial accumulation of the ENTIRE short side of the May 1976 Maine Potato Futures Contract ("Contract") by the country's two biggest and most powerful potato processors (JA 95), co-conspirators J. R. Simplot and P. J. Taggares, and their companies, children, other family members, friends, cronies and debtors, and their partnerships in concert with, principally, four brokers (only

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ture suggest. *E.g.*, some recent samples: "Despite His 'Image' [allegations of fraud in commodity options and a squeeze in wheat futures], Rosenthal Seems Sure to Head Chicago Board of Trade", *The Wall Street Journal*, December 31, 1980, at page 5, cols. 2-3; "Who Guards Whom At The Commodity Exchange", *Fortune*, July 28, 1980; "The Insider Issue In Commodity Futures", *Business Week*, July 7, 1980; *The Silver Bulls* by Paul Sarnoff, November, 1980, Arlington Press (recounting how major silver futures manipulators and exchange insiders almost collapsed the nation's financial markets, knowingly aided and abetted by exchange officials); "11 Cotton Brokers Indicted Charged With Rigging Trades" December 30, 1980, *The New York Times*, D-9, cols. 2-3; *Smith* v. *Groover*, 468 F. Supp. 105 (N.D. Ill. 1979).

Thus, after the first Chairman of the Commodity Futures Trading Commission ("CFTC"), William T. Bagley, reviewed the situation on the theretofore largely unregulated New York exchanges in 1975, he was widely quoted as saying that "all the New York exchanges should be closed up". *E.g.*, Sarnoff, *Silver Bulls, supra* at p. 19; *see* Senate Hearings at pp. 307-308, 345-346, 368-369, 581-582, 758. Similarly, a Congressman quoting from the July 29, 1974 Report of the Senate Permanent Subcommittee on Investigations concerning grain transactions, shrewdly observed as follows:

> "The Subcommittee finds that . . . self regulation by the commodity exchanges themselves to prevent abuses in futures trading . . . [is] . . . 'fox in the chicken coop' regulation." Senate Hearings, p. 758.

See also, *Rosee* v. *Chicago Board of Trade*, 36 F.R.D. 684 (N.D. Ill. 1965); *see* Senate Hearings, pp. 629-660.

Contrary to their quasi-governmental and not-for-profit institution claims, commodity exchanges are in reality collections of the most profit-oriented individuals on earth, who each pay hundreds of thousands of dollars for their membership. The unifying principle for those who create, maintain and govern the exchanges is simple:

(footnote continued on next page)

three of whom are petitioners here)—all with the invaluable aid of Exchange officials, and played out before a paralyzed or inept CFTC.

Facts[2]

Background

Potatoes are perishable, being harvested in the autumn and rotting in spring (usually May or June) of the year.

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profits. *See* Sarnoff, *Silver Bulls, supra* at 26-27, 35-36, 40-41; compare, Senate Hearings, at pp. 203, 307-308.

In fact, each exchange consists of competing constituencies—of late, retail houses (*e.g.*, Merrill Lynch), trade and specialist houses (*e.g.*, Conti, Moccatta, the historical main customers) and the anonymous but ascendant floor brokers (the so-called "scalpers", but also the persons populating exchange committees and most dominant in determining exchange policy, and most interested in the Exchange *qua* exchange, *i.e.*, as a money-making vehicle)—whose only motive in influencing policy and enforcement (or *lack* thereof or discrimination therein) is, as noted, to *profit* themselves. See, "Silver Study Warns of Repeat of Chaos", June 2, 1981 *The New York Times*, p. D-7, col. 1; Hearings before a Subcommittee on Government Operations, House of Representatives, 96th Congress, 2nd Sess. (indicating that exchange insiders may have calculated market regulation to benefit their short positions in a struggle against the Hunts (longs) in 1979-80 silver futures contracts).

This insider tug-of-war offers irresistible incentive reciprocally to pretend or simulate regulatory enforcement, feign negligence, or pervert self-regulation into a tool for accomplishing a manipulation. *Ibid.*; Sarnoff, *Silver Bulls, supra*; "Who Guards Whom At The Commodity Exchange", *supra; Just Plain Folks,* NBC, May 30, 1981, 10:00-11:00 P.M. (recounting the various manipulations of the Hunts of Dallas, including silver futures, with their confederate Norton Waltuch, the ever-available exchange insider); *Strax* v. *Comex et al. (Hunt & Waltuch)*, 79 Civ. 5366 (S.D.N.Y.) (MEL); *Pollock* v. *Citrus Exchange (Waltuch)*, 78 Civ. 0178 (S.D.N.Y.) (LWP); *Friedman* v. *Bache (Hunt)*, 80 C 1111 (N.D. Ill.) (J. McMillen). In the instance of petitioner New York Mercantile Exchange and its officials, the profit incentive rendered it extraordinarily difficult to provide market regulation: 80% of the Exchange's revenues were generated by the Maine potato contract of which, by far, the largest portion came from the May contract (which has since been discontinued, due to the ease of manipulation thereof). *The Wall Street Journal*, May 27, 1976 at p. 3, col. 2. See *infra*, pp. 8-12.

2. Taken from pleadings (JA 7-59), certified record from both lower courts, majority opinion below (JA 87-173), and submissions of pre-trial input and investigation (JA 3).

The Contract required delivery of one rail carload (equal approximately to 50,000 pounds or 500 hundred weights ("cwt.")) of Grade A Maine potatoes to New York City between approximately May 10 and June 5, 1976.

Contract trading commenced in February, 1975 (*i.e.*, three months before the 1975 crop was planted) and ended on May 7, 1976. Trading opened and proceeded uneventfully, with prices ranging from $5.92 to $9.00 per cwt., until August 11, 1976, when the United States Department of Agriculture ("U.S.D.A.") planting report was released. It recorded an unprecedented low acreage of planted Maine potatoes which, combined with poor growing weather indicating a low yield, presaged record shortages. Contract prices thereafter exploded, cresting at an all-time record high of $19.15 per cwt. on October 2, 1976.

Accompanying this record shortage were reports of an impending European potato famine, which threatened to whip-saw the supply-demand calculation and drive Maine potato prices to astronomical levels. As fall progressed into winter, various European countries (where the potato is still a staple) gradually relaxed restrictions against imports of American potatoes.

Maine potatoes possessed significant locational and labor charge advantages for export shipping costs to Europe. More important, Maine potatoes possessed a long "shelf life" in that they were sorted and packaged "unwashed" (whereas the sorting and packing facilities in Washington and Idaho "washed" potatoes by employing water conveyor belts, broke dormancy, and caused the potatoes to spoil much more quickly, virtually destroying their ability to withstand boat shipment to Europe).

Short Conspiracy

Cash Potato Operations and Past Manipulations of Simplot, Taggares and Ramm

Consistent with the functions of a futures market, Contract prices were nationally reported, read by potato growers and merchandisers, and provided competitive market and price discovery throughout the United States of what the price of Maine round white U.S. No. 1 potatoes delivered per the Contract terms to New York City were predicted to be between May 11 and June 5, 1976.

Observing the record Contract price increases in fall, 1975, were potato growers and merchandisers through the United States, including Idaho. There was no other national market for potatoes because the Chicago Mercantile Exchange's Idaho potato contract had been virtually destroyed by defendants Simplot, Taggares and (crony) Ramm in a spectacular manipulation in 1971. See *infra;* see also Report of the Subcommittee on Special Small Business Problems of the Permanent Select Committee on Small Business, April 1, 1974, at p. 44. Thus, the prices paid for newly harvested potatoes in the field during the early harvest in Idaho increased from $3.00 per cwt. to a $3.50-$4.00 range between August and mid-September, 1975.

Defendant J. R. Simplot was a net purchaser of at least 25,000,000 cwt. of potatoes per year. Accordingly, the $.25-$.50 per cwt. price increases recorded on the potato cash markets in Idaho could translate into annual increases of $6-$12,000,000 in Simplot's potato purchasing requirements costs. Defendant Taggares was also a large net purchaser of potatoes; approximately 10,000,000 cwt.

Simplot and his companies forward contracted (*i.e.*, committed themselves, even before the potatoes were planted, to purchase the yield from a specified number of a grower's acreage at a negotiated price) approximately only

50% of their fresh potato purchasing requirements, and acquired the other 50% via fresh market purchases at selected times during the year. Other potato processing businesses, not wishing to risk the vagaries of the cash market, forward contracted 80-90% of their potato purchasing requirements.

This difference in methods appeared in September, 1975 to have crucially backfired on Simplot because he had not anticipated the Contract price increases. Simplot's competitors, which had secured 80-90% of their potato processing requirements at prices negotiated during the February-March 1975 period (during which cash market prices had been lower and the Contract, the key indicator of prices in the future, had been trading at $5.94-$6.25 per cwt.) were thus at a distinct competitive advantage over Simplot, who had to purchase approximately 12,000,000-13,000,000 cwt. of potatoes in the face of $19.00 Contract prices during the next year. Because of the intensely price-competitive market for processed potatoes (with MacDonald's, Burger King, the U.S. Army and other large contracts turning on $.05-$.10 per cwt. differences on major contracts, including Bicentennial contracts to be negotiated that year), Simplot faced serious consequences if the Contract continued to trade at $13.00-$19.00 and, observing this, the growers in Idaho continued to demand higher prices as May, 1976 approached.

In 1973 Simplot consented to the entry of an order by the Commodity Exchange Authority ("CEA") enjoining him and his corporate vehicles from, and directing him and them to cease and desist, manipulating or attempting to manipulate commodities in interstate commerce. Ditto defendants Taggares and Ramm, who manipulated the long side of the same contract of which Simplot—again in a year of great shortages of potatoes—was manipulating the short side.

Such order was entered in connection with another May potato futures contract, this one in 1971 on the Chicago Mercantile Exchange, in which Simplot and his corporations had: (a) taken a massive 700-car short position; (b) repeatedly used "roller cars", that is railroad cars of potatoes which were shipped without having been pre-sold and which roll from point to point in search of a buyer so that they assert a depressant effect on both the terminal markets they pound with potatoes and the shipping points they demoralize with reports (thus creating the perception) that no buyers are available; (c) not liquidated such 700-car short position and had failed to deliver thereon and claimed in excuse therefor that there was a railcar shortage and emergency; and (d) persuaded the contract market to declare a cash settlement instead of a default, purportedly because there was a non-delivery situation excusable because of the claimed railroad car shortage declared by the Governor of Idaho to be an emergency. As noted above, that manipulation and the adverse publicity that followed virtually destroyed the Chicago Mercantile Exchange's potato contract.

Short Selling, Conspiracy, Roller Cars and Defiance from IPGA

Confronted by skyrocketing Contract prices and Idaho growers who, citing the $19.00 Contract prices, demanded more money for their potatoes, Simplot realized it would be a very long, expensive and potentially disastrous business year if the high Contract prices continued. Remembering the slap on the wrist from 1971, Simplot, on or about September 12, 1975, resorted to his old tactics, beginning to sell Contracts, this time through petitioner Thomson & McKinnon Auchincloss Kohlmeyer, Inc. ("Thomson").

By March, 1976, Simplot had accumulated extraordinarily and unlawfully large short positions in the Contract. Despite his heavy selling, however, the increasingly bullish

fundamentals for the Contract (accelerating export demand and disappearing supplies) had again driven prices up, this time to above $14.00 per cwt. and knowledgeable trade people were talking about $40.00 per cwt. prices by the time potato supplies ran out in May (or earlier). Buoyed by such talk, the Idaho Potato Growers Association ("IPGA"), with which Simplot did virtually all his forward contracting, had refused *for the first time in history* to meet the terms dictated by Simplot.

Thus, Simplot met with defendant Taggares in March, 1976. Taggares was then a net long in the Contract. To avoid another stand-off and promote their mutual self-interest of manipulating cash prices as low as possible, they entered into an agreement to sell short, drive Contract prices down, and destroy the Contract, if possible. To formalize this agreement they chose to use their joint-venture partnership, Simtag Farms (another defendant below avoiding this appeal process), as a trading vehicle. Further, and contrary to their own economic interest to sell potatoes for the best price, they bombarded eastern cash potato markets with roller cars, so as to panic western potato farmers and depress eastern potato prices.

In order to have the best friend possible at the Exchange for the problems following their default, it had been recommended to Simplot and Taggares that they open their account with the Vice Chairman of the Board of Governors of the Exchange, Benjamin Pressner.[3] Before Pressner would allow Simtag to open an account, let alone place a single trade, he demanded $1,000,000 in margin. Simplot paid $1,000,000 by his check to Simtag which, under Taggares' signature, paid the $1,000,000 to Pressner.

3. Benjamin Pressner was not only the Vice Chairman of the Exchange during these critical events but was, dually, head of Pressner Trading Corp. ("Pressner"), the fourth principal futures commission merchant in the Contract, see discussion *supra*, n.1. The Pressners, though defendants below, similarly chose to avoid this appeal process.

Thereafter, Taggares began to trade short through his, his corporations', his children's, his employees' and his debtors' accounts; Simplot similarly continued doing likewise through his, his corporations', his friends' and his wife's accounts; conspirator-defendant Ramm switched from the long side and began selling short through his accounts; and Simplot and Taggares caused their partnership, Simtag, to take extremely large short positions (totalling 25 million pounds of potatoes).

The petitioner future commission merchants here permitted defendants Simplot and Taggares to acquire and maintain unlawfully large positions in violation of CFTC speculative limits, and petitioners Heinold and Thomson violated or ignored numerous of their internal rules to accommodate these large customers.

By April 28, 1976, the CFTC had finally determined that emergency intervention into Contract trading was necessary for a number of reasons, including the presence of Simplot, Taggares, Ramm, their histories of manipulating, their extremely large, concentrated short position and the very low supplies. However, rather than acting, the CFTC met with the Exchange officials on April 28 and April 30, 1976 (the week before the May 7 end of trading).

Of course, the Exchange officials wanted Contract trading to continue because the final days of trading were very profitable for the Exchange (see n.1, *supra*). Equally important, however, the Exchange was conspicuously represented at both these meetings, not by the Chairman of its Board of Governors, Jacob Stern, but rather by Simplot's agent, Vice Chairman Benjamin Pressner. To allow Simplot more time to drive down Contract prices and force IPGA into submission, Pressner, *inter alia*, pooh-poohed suggestions by the Exchange President that Simplot was out to destroy the Contract. Pressner persuaded the CFTC not to intervene in Contract trading, suggested they take the pitiful gesture of sending warning telegrams, and even

vouched for Simplot as a man of his word (JA 49, 97-98, 101). Pressner and the individual petitioners here concealed these meetings with the CFTC from others members of the Exchange Board of Governors, until after the default.

Thereafter, despite the CFTC's warning telegrams and follow-up warning telephone calls about liquidating the positions during the last week of trading, Simplot and Taggares not only refused to liquidate, but sold many more Contracts.

On May 7, the final trading day, Simplot and Taggares ELIMINATED all competition on their side of the market by CONSOLIDATING their orders and accounts from their different brokerage houses, including those carried at petitioners Heinold, Thomson and Clayton, in the hands of Vice Chairman Pressner's floor broker on the last day. The petitioners were required by Exchange Rule 44.02 to liquidate Simplot's and Taggares' positions to ensure that they had delivered stocks on hand. Rather than observe Exchange Rule 44.02, and despite the fact that they knew their customers lacked deliverable supplies, petitioners capitulated to their large customers and permitted them to determine for themselves whether they would liquidate (and at what price) or default.

This enabled Vice Chairman Pressner's floor broker in the pit on the final day to control and withhold the liquidation side of one-half of the market. Of course, not only did Simplot and Taggares *not* liquidate, but they and their co-defendants pounded Contract prices down by selling many more Contracts on May 7. As a result, despite the record bullish fundamentals, prices plummeted on May 7 from $10.70 per cwt. to $8.10 per cwt. But there was a near-record open interest (in a year of record shortage) after trading ended and thus Simplot, Taggares, Ramm and their cronies, owning 99% of the 1911 Contracts, were obligated to deliver almost 100,000,000 pounds of Maine potatoes.

Thereafter, the petitioner futures commission merchants were required by Exchange Rule 44.02 to purchase Maine potatoes to deliver on their customers' accounts. Instead of performing, however, two petitioner-brokers simply obtained indemnification agreements from Simplot for all damages resulting from their violation of their obligation in this respect. The Exchange similarly failed and refused to enforce its rules, including Exchange Rule 51.14, to the effect that the president would purchase potatoes to cover any defaulted position.

As the 1975 crop perished, potato prices plummeted. The May Maine potato contract has since been discontinued, and IPGA has never refused to come to terms with Simplot again (its Secretary, who reported the roller cars to the CFTC in 1976, has since been fired).

Long Conspiracy

Toward the end of April 1976, as is so often the case in commodity futures (see n.1, *supra*), a second conspiracy allegedly began to evolve. Various defendants below and others, having learned of the conspiracy of the shorts, determined to conspire and "squeeze" those shorts. The squeeze would be accomplished by purchasing as many contracts as possible and then tying up the cash potato market so that the shorts could not make delivery. As a result of the scarcity of potatoes available for delivery by the shorts (Simplot and Taggares) against the Contract, these long counter-conspirators necessarily obtained more long positions than could be delivered on.

Damages

Together, these manipulations destroyed a competitive market altogether and caused substantial damages. Respondents held long positions in March when Simplot and Taggares formed their conspiracy; Simplot accelerated his short selling, Taggares switched to short selling, and both

men bombarded the cash markets with roller cars and commenced more short selling through their joint-venture partnership. Simplot, Taggares and their conspirators then not only BROKE the bullish trend but actually DROVE DOWN Contract prices from in excess of $14.00 to $8.00-$9.00 per cwt. range. (A $6.00 per cwt. plummet in prices on only 50 Contracts translates into $150,000—500 cwt. x $6.00 per cwt. x 50.)

Further, respondent Incomco was forced to take delivery on 35 March 1976 Maine potato futures contracts because it believed that the potatoes which its March contracts represented were worth far more than the March contract trading prices reflected (because of price arbitrage, when Simplot and Taggares manipulated the Contract price downward they had to manipulate downward *all the other* Maine potato futures contracts as well). Respondent Incomco thereafter stored such potatoes in Maine in anticipation of selling same in May for delivery on the Contract. When the default of Simplot, Taggares and their conspirators became obvious after May 7 but well before the Contract delivery period had expired, Incomco was unable to make proper delivery under the Contract because the long conspirators had succeeded in tying up virtually all railroad cars in Maine (Contract delivery was required to be made by rail cars).

Incomco and its agent orally and in writing made numerous demands upon the Exchange to permit extension of the delivery period and/or for permission to deliver potatoes by truck rather than rail cars. It was, or should have been, obvious to the Exchange, in view of the large open short positions, that there was a ready, willing market for these potatoes and that such extension or permission would ameliorate the defaults. Moreover, it also was, or should have been, apparent to the Exchange that measures necessary to permit delivery and avoid default should have been taken. However, the Exchange not only ignored these demands but,

as noted, in violation of its own Rule 51.14, it *refused* to purchase any potatoes to cover the defaults of Simplot, Taggares, *et al.*

Since potatoes were then perishing, Incomco's potatoes eventually could not meet the United States Department of Agriculture standards and, thus, were unsalable—they rotted.

Respondent Leist had warned petitioner Levine of a threatened manipulation in March, 1976. In fact, though no action was taken by the Exchange, a defendant below threatened Mr. Leist's life if he interfered with the manipulation, which threat Mr. Leist promptly reported to the CFTC (and, after being threatened again, to the U. S. Attorney's office). The CFTC or its predecessor Commodity Exchange Authority staff had previously received reports that, and investigated whether, such defendant was financed by organized crime figures Meyer Lansky and Samuel Cohen.

It was, *inter alia,* Mr. Leist's report which prompted CFTC officials to meet with the Exchange on April 28 and 30, 1976 (actually with Simplot's agent, Vice Chairman Pressner; Exchange Board of Governors Chairman Jacob Stern, a veteran potato contract manipulator since at least 1955, accommodatingly left for Florida to allow the defendant Vice Chairman an opportunity to persuade CFTC officials that neither the Exchange nor the CFTC should act to stop Simplot's and Taggares' destruction of the Contract).

In concluding our statement of the case, we must describe the relationship of the fact situation here to the rest of society. *Llewellyn, supra,* n.1 Since the 1974 amendments to the CEA, the commodity futures business has EXPLODED, tripling from a .5 to a 1.5 trillion dollar business. These markets are extremely important, impacting almost immediately on consumers and producers of farm

products, financial instruments, precious metals, etc. However, merely stating that the commodity futures markets are extremely important does not complete our task.

The legal mind normally approaches problems through legal terminology and assumptions: *e.g.*, this collection of individuals is a "contract market" or a "commodity exchange", and perhaps entitled to some presumption of regularity; that collection of individuals is a "futures commission merchant", these people are "floor brokers", and those people are "non-registrants"—encompassing anyone from the average investor trying to hedge against inflation through interest rate, gold or silver futures contracts, to the *large* manipulators.

We must attempt to pierce through this potential morass of legal terminology and assumptions, and emphasize that, despite the uniqueness of the default, the EGREGIOUS unlawfulness here actually TYPIFIES the "bad lands of the commodity futures markets". *Hecht* v. *Harris, Upham & Co.*, 283 F. Supp. 417, 435 (N.D. Cal. 1968). "From the beginning, the inherent speculativeness of commodity trading and the absence of government regulation spawned a breeding ground for unscrupulous tactics, manipulation, and irresponsible trading." *Precious Metals Associates* v. *CFTC*, 620 F.2d 900, 905 (1st Cir. 1980). Be they exchange insiders or brokerage house salesmen and officials, commodity futures personnel all too often behave and array according to allegiance to concentrations of money and considerations of self-interest—such that, when cast in stark relief as at bar, they break down not as "futures commission merchants" etc. but rather as "longs" and "shorts", with both sides attempting to use their positions and money to influence events, policy and prices.

Worse, consent decrees, injunctions or suspensions often provide a notoriety, even a perverse sort of credibility or mystique to the exchange insider, regardless of whether he

operates on the biggest[4] or the smallest[5] exchange. Of course, the suspensions, fines, etc. may be merely a cost of doing business to the large manipulator—aside from substantial trading profits, Simplot and Taggares profited spectacularly from both the short and long run beneficial effects on *their* cash market potato business of the manipulation (which effects included the eventual discontinuance[6] of the May contract).

Thus, with the advent of the CFTC in 1975, many thought that manipulation of commodity futures contracts would become a social anachronism, a vistigial excess of the complete freedom those markets had theretofore operated in and abused. That at any rate has been the objective of Congress' commodity regulation for fifty years. See *infra*.

In fact, more nearly the opposite has occurred. The CFTC has marginally afforded commodity futures markets what they have always coveted, an aura of respectability and trustworthiness.

Combined with a variety of other factors, it has thereby provided them with more victims to be plucked, and the incidence of major market disturbances had steadily increased until the Second Circuit's decision last July: 1976, potatoes and frozen pork bellies; 1977, coffee and soybeans;

4. See "Despite His 'Image' [allegations of fraud in commodity options and a squeeze on the wheat futures] Rosenthal Seems Sure to Head The Chicago Board of Trade", *supra*, at n.1.

5. Petitioner Stern attained his Chairmanship of the Exchange Board of Governors only AFTER consenting to a Commodity Exchange Authority decree ordering him to cease and desist manipulating Maine potato futures contracts.

6. Some may argue that Simplot, Taggares and Ramm are losing their power inasmuch as it took three years for the May Maine contract to disappear, whereas the Idaho May contract ceased to be a force immediately after the 1971 debacle. But the rejoinder to these nay-sayers is that the May contract was TOTALLY discontinued whereas the Idaho contract is still lingering.

1978, orange juice and silver; 1979-1980, potatoes, wheat, sugar, cotton, copper and silver.

The CFTC has been greatly criticized for mistakenly deferring to exchanges and for many other problems (*e.g.*, the "most screwed-up agency", Senator Thomas Eagleton). It almost did not survive its "sunset" or reauthorization hearing in 1978. Today, the CFTC continues to rely upon these exchanges, and upon private attorneys-general (whom it calls "necessary" or helpful) to deter the wrongdoing. *E.g.*, *Amicus* brief filed in *Leist* v. *Simplot*, below.

But the exchange insiders have been *un*willing to provide this deterrence. And the private attorneys-general have been unable. As perhaps in all new areas of regulatory law, there has been a tug-of-war played out in the courts here: on one side, the well-heeled, highly organized, self-interested concentrations of money most affected by the regulation and court rulings (brokerage houses, large traders and exchanges); on the other side, fortuitous, disorganized victims, adventitiously harmed but determined to obtain justice. The early losses of these plaintiffs (coupled with the CFTC's infamous bumbling) initially eviscerated and *reduced* deterrence, rendering commodity futures fairly safe for manipulators.

We firmly believe, for example, that the gargantuan, infamous Hunt silver conspiracy accelerated when it did, in early July 1979, because of judicial decisions: (1) the decisions denying certification and antitrust jurisdiction in 1978 (*C&S Associates* v. *Anderson, Clayton & Co.*, 1978-1 Trade Case (CCH) ¶61,985 (S.D.N.Y. 1978), and *Smith* v. *Groover, supra*); (2) the CFTC's inability to sanction the Hunts meaningfully in soybeans, in early 1979 (*CFTC* v. *Hunts*, 591 F.2d 611 (7th Cir. Jan. 1979) *petition for rehearing denied* March 23, 1979); (3) Judge McMahon's denial of the private right of action in mid-1979 (*National Superspuds* v. *New York Mercantile Exchange*, 470 F. Supp. 1256, 1263 (S.D.N.Y. May 29, 1979)); and (4) Judge

Decker's refusal to imply a private right of action against, or permit Clayton Act jurisdiction over, the Hunts (*Liang* v. *Hunt et al.*, 477 F. Supp. 891 (N.D. Ill. July 29, 1979)—the "green light" decision rendered just three days before the Hunts and Arab Sheiks formed the joint venture which drove silver prices through the roof).

Leist v. *Simplot* halted this trend. Now it is up to this Court to reverse the trend, and to reverse it by recognizing that the only true deterrent to large manipulators, the only disagreeable, unglamorous penalty which forces exchange and brokerage house personnel to staff and listen to their compliance departments, is the certitude of large damage suits from every investor harmed by their enlistment in, or feigned ignorance of, the manipulation.

Summary of Argument

During the last fourteen years, more than 45 courts have upheld or accepted (see n.7 and n.9, *infra*), and during the last four years the CFTC has advocated, implied private actions under the CEA.

The excellent, scholarly opinion of the Second Circuit Court of Appeals (Friendly, J.) correctly apprehends (nay, anticipates) the relevant law. *Compare* (JA 158) (Congressional intent is the "ultimate touchstone" of the implication analysis), *with California* v. *Sierra Club*, —— U.S. —— Slip Op. at p. 5 (April 28, 1981) ("ultimate issue" is Congressional intent); *Northwest Airlines, Inc.* v. *Transport Workers Union of America*, —— U.S. ——, 101 S. Ct. 1571, 1580 (April 20, 1981) ("ultimate question . . . is whether Congress intended to create the private remedy"); *Riegel Textile Corp.* v. *Celanese Corp.*, No. 80-7697 (2d Cir., May 6, 1981) (J. Kearse of the panel below, joining a panel applying recent implication decisions to deny an action).

In order to strengthen deterrence against the very evils at bar, Congress enacted "remedial legislation" in the "contemporary legal context" of 1973-74, which constituted "the first complete overhaul of the Commodity Exchange Act since its inception" and a "comprehensive rewrite of futures trading regulation". *Cannon* v. *University of Chicago*, 441 U.S. 667, 698-699 (1979); H.R. Rep. No. 93-975 at 1; H.R. Rep. No. 93-975, 93d Cong. 2d Sess. 39 (1974).

As the court below correctly perceived, there are FIVE crucial distinctions between the *sui generis* circumstances of the CFTCA, and those present in this Court's recent implication decisions:

(1) here, Congress was considering NOT a blank slate but rather a pre-existing statute under which implied private actions had been UNIVERSALLY and UNANIMOUSLY recognized, see Point I, pp. 20-21 *infra;*

(2) in the increasingly liberal federal jurisprudence prevalent at the time of the relevant legislative action, 1973-74, Congress did not, by today's standards, know how to apply a private remedy if it wished to, see Point II, pp. 21-25 *infra;*

(3) the legislative history TEEMS with evidence that Congress CONTINUED the implied private remedies, see Point III, pp. 25-34 *infra;*

(4) the private remedies here were (i) created after well-recognized implied private actions existed (Point IV, pp. 34-39 *infra*), (ii) expressly and carefully described as NOT intended to "interfere with the courts in *any* way" [emphasis supplied] (pp. 31-32 *infra*), and (iii) *predicated* on the availability of the implied private action (see pp. 29-31 *infra*); and

(5) the unparalleled incidence of swindling endemic to the "badlands" of the commodity futures markets,

especially the evils at bar, can best be deterred by private actions for damages. See Statement of Case *supra*.

Petitioners' arguments regarding Prongs I, III and IV of the *Cort* v. *Ash*, 422 U.S. 66 (1975), analysis and many of their subsidiary arguments regarding Point II are INSUBSTANTIAL, and, rather than burden this brief with repetitious material, we implore the Court to consult the opinion below, especially JA 129-137 and JA 169-170.

In these compelling circumstances, the Second Circuit correctly apprehended and (via an Act, rather than a section analysis (JA 159-164)) applied this Court's recent decisions to uphold the implied private action by (i) *per force* operation of the re-enactment canon of statutory interpretation, *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) and (ii) a finding that petitioners here could not rebut the presumption that Congress approved the prior judicial decisions (JA 143-146).

POINT I

Private actions were universally and unanimously recognized before the relevant legislative action.

When Congress enacted the CFTCA in the "contemporary legal context", *Cannon* v. *University of Chicago*, 441 U.S. 667, 698-699 (1979), of 1973-74, fully FOURTEEN courts had UNANIMOUSLY (with nary even a dissenting judge or justice—except to the extent that Justice Stewart would have allowed the CEA claim to proceed DIRECTLY to trial in *Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113, 114 (1973)) recognized the implied private action under the Act.[7]

7. *Deaktor* v. *L. D. Schreiber & Co.*, 479 F.2d 529 (7th Cir.), *rev'd on other grounds sub nom. Chicago Mercantile Exchange* v. *Deaktor, supra; Booth* v. *Peavey Company Commodity Services*, 430

(footnote continued on next page)

In fact, in the leading case, *Deaktor, supra*, at 534 (which was cited numerous times to the House and Senate, *e.g.*, JA 140), the Seventh Circuit Court of Appeals emphasized that the courts had then "apparently uniformly concluded that such an [implied] action exists." *Accord, Case & Co., Inc.* v. *Board of Trade of the City of Chicago*, 523 F.2d 355, 360 (7th Cir. 1975) (when Congress enacted the CFTCA it was "undisputed that a private cause of action may be maintained under the Commodity Exchange Act").

Indeed, Congress apparently was apprised that these reported cases were but the tip of the iceberg (JA 120 n.16, 142).

Thus, prior to 1974, the Supreme Court and all other courts "had consistently found implied remedies . . . . It was *after* [Congress initiated consideration of the 1974 amendments] that this Court decided *Cort* v. *Ash* [(1975)] and the other cases cited in support of . . . strict construction of the *remedial* aspect of the statute . . . . In sum, it is not only appropriate but realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts and that it expected its enactment to be interpreted in conformity with them." [emphasis supplied] *Cannon*, 441 U.S. 667, 673.

F.2d 132 (8th Cir. 1970); *Seligson* v. *New York Produce Exchange*, 378 F. Supp. 1076 (S.D.N.Y. 1974), *aff'd sub nom. Miller* v. *New York Produce Exchange*, 550 F.2d 762 (2nd Cir.), *cert. denied*, 434 U.S. 823 (1977); *Arnold* v. *Bache & Co., Inc.*, 377 F. Supp. 61 (M.D. Pa. 1973); *Gould* v. *Barnes Brokerage Co.*, 345 F. Supp. 294 (N.D. Tex. 1972); *Johnson* v. *Arthur Epsey, Shearson, Hammill & Co.*, 341 F. Supp. 764 (S.D.N.Y. 1972); *McCurnin* v. *Kohlmeyer & Co.*, 340 F. Supp. 1338 (E.D. La. 1972), *aff'd per curiam*, 477 F.2d 113 (5th Cir. 1973); *United Egg Producers* v. *Bauer International Corp.*, 311 F. Supp. 1375 (S.D.N.Y. 1970); *Anderson* v. *Francis I. du Pont & Co.*, 291 F. Supp. 705 (D. Minn. 1968); *Hecht* v. *Harris, Upham & Co.*, 283 F. Supp. 417 (N.D. Cal. 1968), *modified on other grounds*, 430 F.2d 1202 (9th Cir. 1970); *Goodman* v. *H. Hentz & Co.*, 265 F. Supp. 440 (N.D. Ill. 1967).

POINT II

In the increasingly liberal federal jurisprudence prevalent at the time of the legislative action, Congress did not, by today's standards, know how to imply a private remedy if it wished to.

Moreover, this UNANIMITY and UNIVERSALITY were only part of the contemporary legal context".

First, 1973-74 was the HIGH TIDE of judicial activism in implying private actions under the closest factual and legal analog at bar, federal regulation of the securities industry. *E.g., J. I. Case Co.* v. *Borak,* 377 U.S. 426 (1964); *Superintendent of Insurance of the State of New York* v. *Bankers Life & Casualty Co.,* 404 U.S. 6 (1971); *Affiliated Ute Citizens* v. *United States,* 406 U.S. 128 (1972). Indeed, at the time Congress considered the CFTCA, lower courts had been liberally implying private actions for thirty years, and the Supreme Court had apparently never rejected an implied private action under the securities laws. Pitt, *Standing To Sue Under The Williams Act After Chris-Craft,* 34 Bus. Law 117, 121 (1978) (JA 113-118, 141).

Second, 1973-74 constituted a trend of accelerating liberalism in the nation and courts at large, including (i) serious conjecture about the demise of the Republican Party, (ii) an impending liberal and Democratic Party landslide in the 1974 Congressional elections, and (iii) loss of public faith in governmental institutions except for federal courts which (unlike now) were the contemporary heroes. Activist, even *interventionist,* court holdings typified an increasingly liberal jurisprudence in cases involving busing, prisons, and moral questions, as well as implying private actions.

Thus, unlike Congress today—which has had ample warning to provide more court resources, and to be explicit

where creation of court remedies is desired[8]—in 1973-74 Congress had no inkling of a more conservative jurisprudence and so simply did not, by today's standards, know how to imply an action if it wished.

Suggestions that *National Railroad Passenger Corp.* v. *National Railroad Passenger Association*, 414 U.S. 453 (1974) ("Amtrak") could have accomplished the herculean task of signalling a stricter implication analysis—despite the stormy seas of liberalism which were engulfing the country—are clearly incorrect, even with the benefit of 20/20 hindsight. In addition to the persuasive reasons below against this (JA 157-58), an analysis on a going-forward basis in 1974 of *Amtrak* would have had to consider the following:

(1) *Amtrak* did not involve a remedial statute, or one designed to strengthen deterrence;

(2) *Amtrak* involved instead a regulatory statute in an industry that had been regulated for one hundred years (and whose train conductors did not swindle people); and

(3) these factors were important because the United States Supreme Court, in *SEC* v. *C.N. Joiner Leasing Corporation*, 320 U.S. 344 (1943), did

8. Query: Would the 1981-82 Congress merely express in the legislative record an intent that private actions be implied under proposed legislation, if it knew that the Supreme Court would in 1989 take the drastic step (within today's "contemporary legal context") of declaring implied private actions to be *per se* unconstitutional? While perhaps in view of today's trend toward increasingly conservative federal jurisprudence, some prescient Congressional staffer might have an inkling of that possibility, the trend in 1973-74 was toward increasing liberalism with no such inkling or clues of a more conservative trend (and, thus, of today's stricter standards) to come.

not apply the *expressio unius* doctrine in the instance of the federal securities laws.[9]

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9. Moreover, as a practical matter *Amtrak's* signaling of a more conservative trend, even with the aid of *bona fide* conservative cases from this Court in 1975-1978, did not prevent the courts from continuing to imply private actions.

Ames v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 567 F.2d 1174 (2d Cir. 1977); *Hirk* v. *Agri-Research Council, Inc.*, 561 F.2d 96 (7th Cir. 1977); *Case & Company, Inc.* v. *Board of Trade of City of Chicago*, 523 F.2d 355 (7th Cir. 1975); *Auditore* v. *Rosenthal & Co.*, CCH Comm. Fut. L. Rep. ¶ 20,658 (N.D. Ga., May 26, 1978); *Bache Halsey Stuart, Inc.* v. *French*, 425 F. Supp. 1231 (D.D.C. 1977); *Kelley* v. *Carr*, 442 F. Supp. 346 (W.D. Wis. 1977); *Romnes* v. *Bache & Co.*, 439 F. Supp. 833 (W.D. Wis. 1977); *E. F. Hutton & Company, Inc.* v. *Lewis*, 410 F. Supp. 416 (E.D. Mich. 1976); *Milani* v. *ContiCommodity Services, Inc.*, 462 F. Supp. 405 (N.D. Cal. 1976); *Shearson Hayden Stone, Inc.* v. *Lumber Merchants, Inc.*, 423 F. Supp. 559 (S.D. Fla. 1976); *Bartley* v. *P. G. Commodities Inc.*, CCH Comm. Fut. L. Rep. ¶ 20,123 [1975-1977 Transfer Binder] (S.D.N.Y., December 23, 1975).

Incidentally, since then, many more courts have upheld the private action.

Witzel v. *Chartered Systems Corp. of New York, Ltd.*, 490 F. Supp. 343 (D.C. Minn. 1980); *Estep* v. *Paine Webber Jackson & Curtis*, —— F. Supp. ——, No. 80-0833-C(5) (E.D. Mo., Feb. 3, 1981); *Dart Partnership* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, Civ. No. H-80-1205, CCH Comm. Fut. L. Rep. ¶ 21,129 (D. Md. 1980); *First Wall Street Settlement Corp.* v. *Nagib*, No. 80 C 0061 (N.D. Ill. July 25, 1980) (*First Wall* is particularly interesting in that it was decided by Judge Marvin Aspen, sandwiched in between his DENIALS of the implied private actions under Sections 11(d) and 13(d) of the Securities and Exchange Act in *Sennett* v. *Oppenheimer & Company, Inc., et al.*, No. 78 C 1418, CCH Fed. Sec. L. Rptr. ¶ 97,834 (N.D. Ill. 1980) and *Gateway Industries, Inc.* v. *Agency Rent-A-Car*, 495 F. Supp. 92 (N.D. Ill. 1980)); *Bache* v. *Friedman, supra* n.1; *Pollock, supra*, n.1.

Chipser v. *Kohlmeyer & Co.*, 600 F.2d 1061 (5th Cir. 1979); *Master Commodities, Inc.* v. *Texas Cattle Management Co.*, 586 F.2d 1352 (10th Cir. 1978); *First Wall Street Settlement Corp.* v. *Hartley*, CCH Comm. Fut. L. Rep. ¶ 20,899 (C.D. Cal., February 23, 1979); *R. J. Hereley & Son Company* v. *Stotler & Company*, 466 F. Supp. 345 (N.D. Ill. 1979); *Jones* v. *B. C. Christopher & Co.*, 466 F. Supp. 213 (D. Kans. 1979); *Palmer Trading Co.* v. *Shearson Hayden Stone, Inc.*, CCH Comm. Fut. L. Rep. ¶ 20,900 (N.D. Ill., April 20, 1979); *Parker* v. *Rosenthal & Co.*, Civil Action No. 76-M-1224 (D. Colo., November 23, 1979); *Poplar Grove Planting and Refining Co.*

(footnote continued on next page)

Further, why did counsel for petitioners—though sued in 1976, and totally contrary to accepted litigation strategy —wait to move against the complaint until AFTER class certification had been heard and decided under Rule 23 of the Federal Rules of Civil Procedure ("F.R.C.P."), AFTER extensive discovery had been taken and completed, and AFTER pretrial submissions? Indeed, if winds of change were blowing, then why did counsel for petitioner Heinold actually sue and take extensive discovery EXCLUSIVELY on the basis of a CEA claim between 1976 and 1978?

Therefore, Congress simply did not, by today's standards, know how to imply a private action in 1973-74. But Congress did know how to imply and, in fact, did imply a private action by the standards then prevailing. *E.g., J. I. Case Co.* v. *Borak, supra.*

POINT III

The legislative history of the Commodity Exchange Act teems with evidence that Congress continued the implied private remedy.

In this "contemporary legal context", Congress undertook remedial legislation designed to deter the very evils at bar. As surely as yellowed papers exhumed from a time capsule, the legislative history of this undertaking constitutes the legacy of another era—as demonstrated above, a far more liberal era in which a court's refusal to imply private remedies under such legislation would have been UNTHINKABLE.

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v. *Bache Halsey Stuart, Inc.*, 465 F. Supp. 585 (M.D. La. 1979); *Smith* v. *Groover*, 468 F. Supp. 105 (N.D. Ill. 1979); *Berenson* v. *Madda Trading Company*, CCH Comm. Fut. L. Rep. ¶ 20,689 (D. D.C., Oct. 30, 1978); *Gravois* v. *Fairchild, Arabatzis*, Comm. Fut. L. Rep. (CCH) ¶ 20,706 (E.D. La., Nov. 9, 1978); *Hofmayer* v. *Dean Witter & Co., Inc.*, 459 F. Supp. 733 (N.D. Cal. 1978).

Obviously, in analyzing materials from a time capsule, we must be careful not to superimpose our understandings upon what we encounter; we must strive to ascertain the meaning of what was intended by remembering the "contemporary legal context" in which the materials were generated.

1. December 13, 1973

First, the Chairman of the Agriculture Committee of the House of Representatives, Representative Poage, on the very day that he INTRODUCED the bill that eventually became the CFTCA, emphasized to the *entire* House of Representatives that "courts [have] implied a private remedy for individual litigants under the Commodity Exchange Act". 119 Cong. Rec. 41,333 (Dec. 13, 1973). This was *not* a random legislator educating his fellow House members about a random topic. Rather, here was the most powerful and most informed person on the relevant committee beginning an explanation—all of which was included in the House Report (JA 139-40)—of the necessity for the MAJOR change made in commodity futures regulation by the proposed bill.

Chairman Poage continued to explain that "the judgment [or feigned lack thereof, he might have added (see n.1 *supra*)] of the board of directors of many of the exchanges in implementing decisions under self-regulatory functions is becoming increasingly a justiciable issue". (*Id.*) The consequences of this, Chairman Poage asserted to the entire House, was that the exchanges had been adopting fewer rules and doing less regulating, a very troubling and significant major failure which required a major change (JA 134-41).

What was the major change advocated by Chairman Poage? A repeal of the implied private action in order to induce exchanges to adopt more rules? No, not in 1973-74; as would be expected, NOT ONE REPRESENTATIVE in

the entire House expressed displeasure with the implication of private actions then (nor did *any* legislator in *either* House express such displeasure at ANY time during the entire 1973-4 process). (JA 139-41, 157-58) Precisely the contrary, Representative Poage argued that a new agency (which ultimately became the CFTC) should be created with authority to COMPEL the exchanges to adopt or amend such rules. (JA 140-42)

No member of Congress could have cast an informed vote regarding this drastic change without understanding Chairman Poage's lecture about the EXTREMELY IMPORTANT implied private action.[10] (We submit, however, that it would then have been an even MORE DRASTIC change to eliminate the implied private action.) Moreover, the change proposed—which was ultimately adopted as § 8a(7)—implicitly relied on the continuance of the implied private action as the whip which insures that exchange insiders enforced such rules as the CFTC compelled them to adopt.

2. House Hearings

Second, the House Agriculture Committee hearings in 1973-74 are CHOCK-FULL of discussions supporting the availability of an implied private action and nary a word disputing it. *See, e.g., Review of Commodity Exchange Act and Discussion of Possible Changes: Hearings Before the Committee on Agriculture, House of Representatives*, 93d Cong., 1st Sess. (1973) 119 (statement of Clark Reed *et al.* representing commodity exchanges and brokers, that disputes "can be reviewed by the courts"), 198 (statement of Leo Melamed, secretary of the board, Chicago Mercantile

10. It must be remembered that Chairman Poage and other members of Congress simply did not know that they would later be required to express an intent to "create private remedies at law". Realizing this, and that statutes are typically "silent or ambiguous" (*Cannon, supra*, 697) where no express action is created, it is truly remarkable how favorable the Chairman's treatment was.

Exchange, on availability of "recourse to the courts"); *Commodity Futures Trading Commission Act of 1974; Hearings Before the Committee on Agriculture, House of Representatives,* 93d Cong., 2d Sess. (1974) 249 (statement of Charles W. Chapin, New York Coffee and Sugar Exchange, that "complainants of course have access to the courts"), 321 (statement of Sheldon L. Berens, Continental Grain Company, that courts "have already held that they have jurisdiction over private complaints based on violations of the present law").

Obviously, therefore, the House bill (H.R. 13113) continued the implied private action.

3. Senate Hearings May 13; Senator Clark and the House Error

Confirming this, on the OPENING day of the Senate hearings, Senator Clark from Iowa lamented the House bill's absence of a *treble* damages provision (three Senate bills and numerous Senators favored a treble damages provision) as well as certain excesses in the bill's exclusive jurisdiction provision, as follows:

> "Unfortunately, the House bill not only does not authorize them, but section 201 of that bill may prohibit all court actions. [The treble damages action was in favor of private individuals; obviously all court actions here refers exclusively or in part to private actions by individuals, all of which actions had theretofore implied ones.] The staff of the House Agriculture Committee has said that this was done inadvertently and they hope it can be corrected in the Senate." Senate Hearings at 205.

The "*staff* of the House Agriculture Committee; . . . *hope*[*s*] it can be *corrected* in the Senate" [emphasis supplied]—besides revealing that both Senator Clark and the relevant House Committee UNDERSTOOD the implied

private action and WANTED it to continue, this statement sets the plot tension for the Senate Hearings: would the Senate act to correct the excesses in the exclusive jurisdiction provision and, thereby, preserve court actions?

4. May 14; Donahoo and Rodino: The Establishment of an Upper Limit on Exchange Arbitrations Was Premised on the Existence of Implied Federal Actions to Handle Large Claims.

On the very next day of the Senate hearings (see p. 371), the Senators were again reminded of the implied private suit (Hearings, p. 385) by the Executive President of the Minneapolis Grain Exchange, one Mr. Donahoo. He faulted the arbitration procedures proposed to be required of commodity exchanges, for not establishing an upper dollar limit:

> "Some of the proposed legislation would require each contract market to provide a fair and equitable procedure for the settlement of customers' claims and grievances against a member or a member's employee. We believe many of the provisions are unsound for several reasons. For example, there is no dollar limit on the size of claims that the contract market must offer to adjudicate. It would be unwise to allow large claims to be decided in this way. *On the other hand, a market-sponsored claim procedure for more modest claims is desirable because of the economic impediment to Court litigation that exists in such cases.* We therefore suggest a ceiling of $5,000 to $10,000 be placed on the claims to be decided by an exchange." [emphasis supplied] Senate Hearings, p. 415.

Spurred by this testimony, Senator George McGovern submitted "several questions" to Mr. Donahoo and—in a portion of Mr. Donahoo's responses selected for inclusion in the record (other portions of such responses were appar-

ently not so selected)—the latter responded by letter (see p. 401), in relevant part, as follows:

> "*Question 8* [from Senator McGovern]. Why limit customer claims to $5,000 or $10,000 [see Mr. Donahoo's proposed limit in testimony quoted above] if the exchanges and markets are working legally, efficiently and equitably [*i.e.*, the ever-vigilant liberals apparently meant that if there's nothing illegal going on and if you can process these matters efficiently and fairly, then why do we need a limit]?
>
> *Answer.* We believe that if a customer has a claim in excess of $10,000, he should hire an attorney to make certain that all facts are presented. *We are advised by our counsel that facts in large claims can best be established through the discovery procedure envisioned in the Federal Rules of Civil Procedure in the Federal court. For these reasons, we believe that customer claims should be limited to $10,000, and claims in excess of that amount should be decided by the courts.*" [emphasis supplied] Senate Hearings, p. 403.

Obviously, the very premise of the exchanges' pleas for establishing the upper ceiling was the *availability* of implied federal suit (and such was corroborated by the numerous criticisms of the exchanges' response to customer complaints. *E.g.*, pp. 580-81). In equally obvious reliance on the availability of the implied private remedy, an upper ceiling limit of $15,000 was placed upon such arbitration. 7 U.S.C. § 7a(11)(ii).

Also, a statement submitted by the then increasingly popular Representative Peter Rodino echoed Senator Clark's concern, that the exclusive jurisdiction language could "oust even federal courts of their jurisdiction"; thus, Rep. Rodino urged the Senators "to define the jurisdiction, including antitrust jurisdiction of federal courts for commodity transactions". Senate Hearings, pp. 257-62. Though Congressman Rodino's emphasized reasons for

avoiding this were federal antitrust and state laws, there is nothing to indicate that these were his exclusive reasons. Indeed, the language he proposed to correct this deficiency was *NOT* limited to preserving jurisdiction over only these matters and there is absolutely no reason for superimposing such a constricted reading on it (JA 153-54). Senate Hearings at 249-57.

5. May 16; Uhlmann and Lebeck

On May 16, 1974, the Senators were twice more reminded of the function of private actions.

Mr. Uhlmann of the Chicago Board of Trade reminded the Senators of the supplemental, voluntary and ALTERNATIVE, ELECTIVE nature of the Exchange arbitration procedure (7 U.S.C. § 7a (11)) in view of the implied private action:

> "Section 209 of H.R. 13113, as passed by the House, provides that a customer can voluntarily request arbitration but then does not require him to be bound by the arbitration proceedings. We feel that if a customer requests arbitration of his own will he should be bound by the results. If he is not, obviously he will take every adverse decision to the Commission or to the courts." Senate Hearings at 524.

Similarly, Mr. Lebeck drove the same point home:

> "MR. LEBECK. The Board of Trade established several years ago a review committee to which customer complaints could go and we have in addition an appeals committee above and beyond that and the customer, of course, still has access to the courts." Senate Hearings at 526.

6. May 21; Senator Talmadge

Repeated insinuations that what the House staff had called an "inadvertency" could actually extinguish private

actions apparently became too much for Committee Chairman Talmadge to take on the next to last day of the Hearings. Senator Talmadge rather snappishly told a witness the following:

> "THE CHAIRMAN. That's about what I was going to suggest. I have read your statement in its entirety, and I doubt that this committee, and I doubt the House had in mind depriving *either Federal courts of jurisdiction in antitrust matters, or any other matter, and certainly not State courts.*" [emphasis supplied] Senate Hearings, p. 664.

7. May 22; Professor Schotland

On the last day of the hearings, Professor Schotland (an administrative law expert), stated as follows:

> "The last question is this: if you do choose to retain [a reparations procedure, now CEA Section 14, 7 U.S.C. § 18] in this regulatory body, there should be explicit language in the statute that federal and state courts are still open if a complainant prefers to go to trial there."

8. Final Statements and Reports: Chairmen Talmadge and Poage

The time capsule shows that during the final statement before passage, Chairman Talmadge emphasized:

> "The vesting in the Commission of the authority to have administrative law judges and to apply a broad spectrum of civil and criminal penalties is likewise *not* intended to interfere with the courts *in any way.*" [emphasis supplied]

120 Cong. Rec. p. 30,459 (daily ed., September 9, 1974).

This phraseology is, we believe, fatal to the petitioners' arguments against the implied action here. In the 1973-74 era, the legislators did not know of the necessity to employ

the "private remedy at law" terminology. Unsurprisingly, in view of this and the recommendations by the witnesses, the praseology of the savings clause (see *infra*) is in terms of "jurisdiction". Of itself, this should be sufficient to encompass all implied rights of action. But see *Rivers* v. *Rosenthal,* 634 F.2d 774 (5th Cir. 1980). But when the leading, most powerful figure on this matter in Congress explains that the REPARATIONS proceeding and all other ADMINISTRATIVE powers in favor of the CFTC do not interfere with the courts "in any way", then we have conclusive sweeping legislative history preserving all causes of action as well. All the limits which our learned adversaries seek to impose on the scope of statements in the legislative history DISSOLVE in the face of Chairman Talmadge's sweeping explanation here.

Moreover, expressly in order to "*make clear* that . . . Federal and State courts *retain* their jurisdiction", the Senate and joint conferees inserted additional language into the statute by adding a savings clause proviso to the exclusive jurisdiction provision, as follows:

> "nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or of any State." (CEA Section 2a) (JA 155).

Finally, lest there be any doubt, the respective chairmen of the House and Senate committees reported that

> "the conferees wished to make clear that nothing in the act would supersede or limit the jurisdiction presently conferred on courts of the United States or any State. *This act is remedial legislation designed to correct certain abuses which Congress found to exist in areas that will now come within the jurisdiction of the CFTC.*" 120 Cong. Rec. 34997 (Oct. 10, 1974) (Representative Poage)." [emphasis supplied] (JA 156).

We believe this Court must recall what the word "remedial" signified in 1973-74, and remember that legislators

were not then aware of the necessity of saying "remedy at law". Recalling this, it is obvious that Congress inserted language to RETAIN federal court jurisdiction over implied private actions.

There is simply no logical or consistent way to read all these materials from the time capsule otherwise. The statements, the passage of §§ 5a(11)(ii) and 8a(7) (predicated as they were on the continuance of the implied private action), the passage of the savings clause to insure that the CFTCA would be "remedial legislation" and the explanation that reparations would "not interfere with the courts *in any way*"—in the "contemporary legal context" of 1973-74, these indicia constitute clear *evidence* that Congress intended to continue and obviously did continue the implied private action.

POINT IV

The reparations procedure was not intended to be exclusive.

Would Congress have immunized from private suit altogether the large manipulators or exchange insiders (see n.1 and p. 3, *supra*) and swindlers (*e.g.*, see Senate Hearings pp. 800-01, regarding the Goldstein, Samuelson scandal) who have plagued[11] futures trading? Would Congress

11. *E.g.*, 1974: "By assuring that the futures markets are not manipulated by a few large speculators, it will provide protection for the American Consumer." Joint Conferees Report, at p. 2. See Senate Hearings pp. 201, 474-479, 511.

1935: "The [1935] debates in Congress, like those in 1922 [see JA 130] . . . again . . . [were] . . . a recognition of the necessary role of speculators and *the focus of the attacks was on the big manipulator*, whose activity was perceived to be detrimental . . ." (emphasis supplied) (JA 132).

1968: "The legislative history of the 1968 amendments continued the *recognition* of the critical role played by speculative investors and *the attack on big or powerful manipulators* . . ." (emphasis supplied) (JA 133).

have rendered it IMPOSSIBLE to prove violations of the CEA against futures commission merchants based on concert of action or conspiracy (such as here) charges involving non-registrants and exempt exchanges (the reparations proceeding being very limited as to discovery)? Would a person sued on contract claims by their broker be unable to assert CEA violation counterclaims and instead have to commence a separate proceeding in reparations to litigate two separate cases? See *Paine Webber Jackson & Curtis* v. *Rosciewski*, CCH Comm. Fut. L. Rptr. [Current Transfer Binder] ¶ 21,175 (S.D. Cal., April 16, 1981).

Yet because the exchanges and the large non-registrant manipulators are not amenable to reparations jurisdiction this will be the ABSURD result should the theory that Congress' creation of reparations EXCLUDES private actions be carried to its ultimate. (JA 150-53)[12]

Confirming that Congress did not intend these absurd results, the language creating reparations does not purport to be "exclusive", "limiting" or in any respect exclusionary. Finally, the Second Circuit's excellent opinion below summarizes many other reasons why the reparation argument is wrong here. (JA 149-53)

12. Even more irrational than respondent Leist's inability to sue all necessary parties in the same forum if this interpretation were correct, is the situation of our client Friedman, in *Friedman* v. *Bache*, *supra* n.1 (an action for fraud, manipulation, and exchange failure to regulate during the Hunts' silver debacle). Congress could not have intended the following jurisdictional jumble in the instance of intimately intertwined defendants alleged to be in a conspiracy there: plaintiff would have to try to sue the non-registrants in federal court where he would have difficulty obtaining or could not obtain complete relief because of the absence of necessary defendants; meanwhile, he would have to sue the registrant for reparations before the CFTC and be unable to make out the claims there in the absence of necessary defendants; meanwhile, the futures commission merchant is suing him in state court; and, worst of all, plaintiff would *lack* the ability to assert any CEA violation counterclaims in the state court action which the futures commission merchant commenced in Florida, because those claims would supposedly be required to be brought in reparations. How can canons be applied to portray Congress as having intended this?

1978 Amendments Confirm This

After holding extensive hearings regarding the operation of the Commodity Futures Trading Commission, the Senate Subcommittee on Agricultural Research and General Legislation reported out a bill authored by Senator Huddleston addressing concerns raised in the hearings. Senate bill 2391. The legislative history of this bill shows that Congress again explicitly affirmed its endorsement of implied rights of action under the Commodity Exchange Act.

The Senate subcommittee seriously considered abolition of the reparations procedure altogether, "to get a lot of this out of your shop and into the courts which would leave you time for other activities," as Senator Huddleston stated to a Commission representative. 1978 Senate Hearings Part II at 79. However, the subcommittee was ultimately persuaded not to abolish reparations proceedings because, as Commissioner Dunn of the CFTC testified, "there should be a reparations procedure for the widows and the orphans. . . ." 1978 Senate Hearings, Part II at 79. Instead, Senate bill 2391 authorized Commission adjudication of claims of less than $5,000 without a full hearing "to expedite the resolution of disputes involving small claims." Senate Report 98-850, reprinted in 1978 U.S. Code Cong. & Admin. News 2117.

Senator Huddleston's bill was considered and passed by the Senate on July 12, 1978, at which time he provided a full explanation of the bill which leaves no doubt as to the intent of Congress:

> "In 1974, Congress directed the Commission to establish a reparation procedure for adjudicating customer complaints against commodity professionals and firms inexpensively and quickly. During the past 3 years, an unexpected number of reparation cases have been filed with the Commission, resulting in a substantial backlog in the processing of these customer claims. *Com-*

pounding the undue stress placed on the reparation program, certain Federal district courts have taken the unfortunate position that Congress intended reparations to be the exclusive forum for adjudicating commodity customer claims. (See *Bartels* v. *International Commodities Corp.*, 435 F.Supp. 865, 870 (D.Conn. 1977) and *Churchwell* v. *Rosenthal & Co.*, Civ. Act. No. 77-F-252 (D.Col. April 4, 1977).) In order to alleviate the burden on the Commission's reparation program, the committee adopted an amendment that provides—for reparation complaints where the amount claimed as damages does not exceed $5,000—that a hearing be held only on the novel or basic issues that are determinative of the case. Thus, *an aggrieved commodity customer will be able to obtain more expeditious treatment of his claim should the customer elect to pursue a claim in reparations rather than proceed to arbitration or pursue in court the private right of action which has been judicially implied for violations of certain provisions of the Commodity Exchange Act, or which in the future courts may recognize for other provisions of the act.* [citations omitted, but see n.7 and n.9, *supra*]"

124 Cong. Rec. S10537 (daily ed. July 12, 1978) (emphasis added).

After certain changes not relevant here were made by the Conference Committee, the 1978 amendments were passed by both houses of Congress on September 28-29, 1978 and became the Futures Trading Act of 1978, P.L. No. 95-405. Senator Leahy, manager of the bill, chairman of the Senate subcommittee that reported the bill, and one of the Senate conferees in the conference committee, introduced the conference version of the bill with these remarks:

"S.2391 creates a statutory cause of action, in Federal district courts, for States to seek injunctive relief or damages, or both, for violations of the Commodity Exchange Act or Commission regulations thereunder, that

> would exist in addition to any causes of action under State general civil or criminal antifraud laws that are not preempted by the Act.... *In those actions brought by a State under this bill, a customer who makes an informed, voluntary election to have his State sue on his behalf to recover monetary damages for a particular violation would thereby extinguish that person's other alternatives for redress: arbitration, reparations, or judicially implied private rights of civil actions under the Act.*"

124 Cong. Rec. S16527 (daily ed. Sept. 28, 1978) (emphasis added).

Against all this, petitioners assert there is a conflict between an implied private action and the Congressional decision to concentrate regulatory authority in the CFTC, and argue that allowing private actions would result in conflicting decisions under the CEA.

However (relying on the implied action, see pp. 30-32, *supra*), Congress required that commodity exchanges provide for an arbitration procedure. § 5a(11) of the CEA, 7 U.S.C. § 7a(11). Use of these arbitrators, who are not employees of the CFTC or otherwise subject to its control, cuts against the cohesion argument and in favor of supplementary, "remedial" legislation.

Moreover, Congress did not require that all appeals from CFTC determinations be heard in one court, as it has done in other statutes.

Finally, and perhaps most conspicuous, antitrust and Justice Department jurisdiction were preserved through the savings clause in CEA Section 7a(11). See Senate Hearings pp. 257-62. How could the legislators have wanted "unequivocal" antitrust applicability, and unfettered arbitration and appeals of the administrative law judges to different federal courts, but decided to eliminate implied private suits in district court on the basis of a cohesiveness argument?

Finally, an exclusionary reading is contrary to the extensive legislative history.[13]

In these compelling circumstances, the Second Circuit correctly apprehended and (via an Act, rather than section analysis, JA 159-164) applied this Court's recent decisions to uphold the implied private action by (i) *per force* operation of the re-enactment canon of statutory interpretation, *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) and (ii) a finding that petitioners here could not rebut the presumption that Congress approved of the prior judicial decisions. (JA 143-146)

Conclusion

The judgment of the Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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13. Petitioners, on the most charitable reading of their motives, are not wholly disinterested in seeking to have the reparation remedy made exclusive. The CFTC reparations procedure is seriously backlogged, and the reparations section is not adequately staffed to handle the extra workload which would result if all complaints were forced into the reparations process (Commodity Futures Trading Commission, 1979 Annual Report, at 29).